

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JAMES E. KING,

No. C 11-1885 SI (pr)

Petitioner,

ORDER OF DISMISSAL

v.

L. SCOTT McEWEN, warden,

Respondent.

INTRODUCTION

James E. King, an inmate at Calipatria State Prison, filed this *pro se* action seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has moved to dismiss the petition as untimely. King has filed an opposition, a motion to stay and a traverse. For the reasons discussed below, the court finds the petition to be untimely and dismisses it.

BACKGROUND

In 1997, King was convicted in Contra Costa County Superior Court of murder with special circumstances, first degree burglary, sodomy, and attempted rape. The trial court sentenced King to a term of life imprisonment without the possibility of parole, consecutive to a determinate term of thirty years. King appealed. The California Court of Appeal affirmed the judgment on August 14, 2000. The California Supreme Court denied King's petition for review on November 29, 2000. King filed a petition for a writ of certiorari in the Supreme Court of the United States, which was denied on March 26, 2001.

King filed one petition for a writ of habeas corpus in state court. His state habeas petition

1 was filed in the California Supreme Court on January 28, 2011, and denied on July 13, 2011.

2 King then filed his federal petition for a writ of habeas corpus. The petition is deemed
3 filed as of March 29, 2011, the date of the proof of service attached to the petition. In his
4 petition, King claims that his incriminating statements should have been suppressed due to an
5 improper interrogation technique and delayed *Miranda* advisements. Respondent now moves
6 to dismiss. In his opposition, King asserts that he is actually innocent. King also moves to stay
7 the federal petition until state court remedies can be exhausted for some new claims.

8 9 DISCUSSION

10 I. The Limitations Period Started On March 26, 2001

11 Petitions filed by prisoners challenging non-capital state convictions or sentences must
12 be filed within one year of the latest of the date on which: (1) the judgment became final after
13 the conclusion of direct review or the time has passed for seeking direct review; (2) an
14 impediment to filing an application created by unconstitutional state action was removed, if such
15 action prevented petitioner from filing; (3) the constitutional right asserted was recognized by
16 the Supreme Court, if the right was newly recognized by the Supreme Court and made
17 retroactive to cases on collateral review; or (4) the factual predicate of the claim could have been
18 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1).

19 King's conviction became final and the limitations period began on March 26, 2001 when
20 the Supreme Court of the United States denied King's petition for a writ of certiorari, *King v.*
21 *California*, 532 U.S. 950 (2001). The presumptive deadline for King to file his federal habeas
22 petition was thus one calendar year later on March 26, 2002. 28 U.S.C. § 2244(d)(1)(A). King
23 missed that deadline by nine years. Unless he qualifies for substantial tolling, his petition is
24 untimely.

25 King argues for an alternative starting date under 28 U.S.C. § 2244(d)(1)(c), which
26 provides that the one year limitations period does not start until "the date upon which the
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1 constitutional right asserted was initially recognized by the Supreme Court . . . and made
2 retroactively applicable to cases on collateral review.” King urges that his one year limitations
3 period should start after the Ninth Circuit held in *Thompson v. Runnels*, 657 F.3d 784, 801-02
4 (9th Cir. 2011), that the police cannot deliberately withhold *Miranda* warnings until the suspect
5 has confessed, and then obtain a second confession after providing *Miranda* warnings.
6 *Thompson* however, is not a Supreme Court case as required under 28 U.S.C. § 2244(d)(1)(C).
7 Furthermore, the Supreme Court vacated *Thompson*, and remanded with instructions to
8 reconsider in light of its holding in *Greene v. Fisher*, No. 10-637, slip op. at 4-5 (U.S. Nov. 8,
9 2011). *See Thompson*, 657 F.3d at 801-02, *vacated sub nom. McEwen v. Thompson*, No. 11-305,
10 slip op. 1 (U.S. Nov. 14, 2011). King’s petition therefore does not qualify for a later starting
11 date under 28 U.S.C. § 2244(d)(1)(C).

12 King also suggests an alternative starting date under 28 U.S.C. § 2244(d)(1)(D), which
13 provides that the one year limitations period does not start until “the date on which the factual
14 predicate of the claim or claims presented could have been discovered through the exercise of
15 due diligence.” In his opposition, King claims that he has newly discovered evidence of his
16 actual innocence: a November 30, 2010 declaration from Cindy Wilson. King claims that his
17 one year limitations period should start from the date on Wilson’s declaration. In this
18 declaration, Wilson states that she witnessed a fight between King and the victim, and saw King
19 leave while the victim was still alive. The factual predicate of a claim is based on a habeas
20 petitioner’s knowledge of the facts supporting the claim, and not the evidentiary support for the
21 claim. *Flanagan v. Johnson*, 154 F.3d 196, 199 (5th Cir. 1998). The time begins ““when the
22 prisoner knows (or through diligence could discover) the important facts, not when the prisoner
23 recognizes their legal significance.”” *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 2000)
24 (quoting *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000)). Wilson’s declaration states that
25 she stopped a fight between the victim and King, that King left before Wilson did, and that the
26 victim was still alive when King left. If Wilson's account was true, King knew long before trial
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1 that there was a witness to his last encounter with the victim. Yet he did nothing to find this
2 witness, until 18 years later, she fortuitously contacted him in prison. King does not qualify for
3 the one year limitations period to start from when he received Wilson's declaration because he
4 had known about the factual predicate of any claim based on his innocence – i.e. the existence
5 of the witness to his departure from the victim's home – for over 18 years since the 1992 murder.
6 King therefore does not qualify for the later starting date under 28 U.S.C. § 2244(d)(1)(D).

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8 II. No Statutory Tolling

9 The one year limitations period is tolled for the “time during which a properly filed
10 application for State post-conviction or other collateral review with respect to the pertinent
11 judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). There is no evidence that King properly
12 filed a state habeas petition during the one year limitations period between March 26, 2001 and
13 March 26, 2002; he therefore receives no statutory tolling.

14 King's 2011 state habeas petition did not toll the limitations period because the
15 limitations period had already expired. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir.
16 2003). Moreover, only a “properly filed” state habeas petition may toll the limitations period,
17 28 U.S.C. § 2244(d)(2), which King's petition was not, as evidenced by the California Supreme
18 Court denial that stated, “[t]he petition for writ of habeas corpus is denied. (*See In re Robbins*
19 (1998) 18 Cal.4th 770, 780; *In re Waltreus* (1965) 62 Cal.2d 218, 225.).” Reply to Opposition
20 to Motion to Dismiss, Exhibit 1, p.1. The California Supreme Court's citation to *Robbins* is a
21 “clear ruling that [the] petition was untimely.” *Thorson v. Palmer*, 479 F.3d 643, 645 (9th Cir.
22 2007). Therefore, King does not qualify for statutory tolling under the provisions of 28 U.S.C.
23 § 2244(d)(2).

1 III. Equitable Tolling

2 The one-year limitations period can be equitably tolled because § 2244(d) is not
3 jurisdictional. *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). “A litigant seeking equitable
4 tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights
5 diligently, and (2) that some extraordinary circumstance stood in his way.” *Id.* at 2562 (quoting
6 *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)); *See also Rasberry v. Garcia*, 448 F.3d 1150,
7 1153 (9th Cir. 2006).

8 King appears to argue that he should qualify for equitable tolling because his
9 incriminating statements were coerced by the police and that at the time of the trial, he “did not
10 know that police beating could be a factor in making any statements they obtained from you
11 inadmissible.” King Decl., p. 4. The contention that this very seasoned participant¹ in the
12 criminal justice system did not know the import of a police beating or coerced confession is not
13 credible. Moreover, a *pro se* petitioner’s ignorance of the law is not, by itself, an extraordinary
14 circumstance warranting equitable tolling. *Rasberry*, 448 F.3d at 1154. This excuse does not
15 warrant equitable tolling.

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17 IV. Actual Innocence Argument

18 King also argues for equitable tolling based on actual innocence. A credible showing of
19 actual innocence under *Schlup v. Delo*, 513 U.S. 298, 327 (1995), can warrant equitable tolling
20 of the habeas statute of limitations period and excuse a missed deadline under that statute. *Lee*
21 *v. Lampert*, 653 F.3d 929, 932 (9th Cir. 2011) (en banc). “[I]f a petitioner . . . presents evidence
22 of innocence so strong that a court cannot have confidence in the outcome of the trial unless the
23 court is also satisfied that the trial was free of non-harmless constitutional error, the petitioner
24 should be allowed to pass through the gateway and argue the merits of his underlying claim.”

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27 ¹King had at least three prior convictions plus several juvenile adjudications. *See* Cal. Ct.
28 App. Opinion at 2 n.2.

Schlup, 513 U.S. at 316. A petitioner claiming actual innocence must support his claims “with new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence — that was not presented at trial.” *Id.* at 324. A reviewing habeas court then “consider[s] all the evidence, old and new, incriminating and exculpatory, admissible at trial or not.” *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotation marks removed). On this complete record, the court makes a “probabilistic determination about what reasonable, properly-instructed jurors would do.” *Id.* The court is to “assess how reasonable jurors would react to the overall, newly supplemented record.” *Id.* In sum, a petitioner must show that it is more likely than not that “no reasonable juror would have convicted him.” *Schlup*, 513 U.S. at 327. Put another way, a petitioner must “persuade [a reviewing court] that every juror would have voted to acquit him.” *Lee*, 653 F.3d at 946 (citing *Schlup*, 513 U.S. at 327) (Kozinski, J. concurring).

A. Evidence Presented at Trial²

On September 28, 1992 . . . the body of 76-year-old Leticia Smith was found in her living room. The cause of death was strangulation, apparently by means of a ligature fashioned from a pair of pantyhose. The victim had suffered blunt trauma injuries to her head and face, and it appeared that she had been assaulted. Fluids from the victim’s genital and anal area were collected and analyzed. The anal smears contained sperm.

Respondent’s Reply to Opposition to Motion to Dismiss, Exhibit 3, California Court of Appeal Decision, p. 2 (“California Court of Appeal Opinion”).

At the time of the murder, King had a history of sexual offenses, and had only been released from prison nine months earlier. The California Court of Appeal summarized his prior offenses as:

²Neither party provided the transcripts of the trial or the clerk’s transcript. The court has only the California Court of Appeal’s opinion to rely upon for a description of the trial evidence. Nonetheless, because the Wilson and King declarations fall so far short of being “trustworthy eyewitness accounts” that provide “new reliable evidence” of innocence, *Schlup*, 513 U.S. at 324, this court need not summon the entire trial record to analyze King’s actual innocence argument.

1 In 1971, while a juvenile, he exposed himself, an offense that resulted in his
2 commitment to a boy's school. The following year, while on a good conduct
3 leave from the school, appellant raped a teacher in her classroom and stole \$6
4 from her. The year after that, after receiving a one-hour pass from football
5 practice, appellant went to a neighboring Veterans Administration hospital where
6 he attempted to rape a woman. Less than two years later he committed an offense
7 which resulted in a conviction of rape, attempted rape and armed robbery. In
8 October 1979, 19 months after his release from prison, appellant kidnaped a 16-
9 year-old girl, raped her and forced her to orally copulate him. In 1984, he was
10 convicted of forcible rape.

11 *Id.* at 2, n.2.³

12 As a convicted sex offender, King was required to provide a DNA sample to the
13 authorities. In 1995, the police matched King's DNA to DNA found in the victim's anus and
14 on her bathrobe. They arrested King on March 6, 1995, and began questioning him after
15 administering *Miranda* warnings. The next day, March 7, 1995, King indicated he wanted to
16 talk, and the police questioned King again – this time without providing new *Miranda* warnings.
17 King stated: “I didn’t sodomize this lady . . . I didn’t sodomize this lady. I did not enter into
18 that lady’s body no kind or way or shape or form or fashion. I don’t know how that came about.
19 It just happened . . . And I was under the influence that day.” *Id.* at 16.

20 The same day, King told the police that:

21 [H]e had been staying in a men’s shelter a couple of miles from the victim’s
22 house. He spent time in her neighborhood, however, working and also using
23 drugs. [King] had a roofing job in the neighborhood. He met the victim when he
24 noticed that a lot of trash and paper, presumably from his work site, had blown
25 into her yard, and went over to help her clean it up. He was at the work site for
26 approximately one week, during which he spoke to the victim a couple of times
27 and used her telephone to call his boss . . . On the day of the crimes [King] had
28 returned to the work site to do some touch up work. He smoked cocaine
throughout that morning. . . . The victim let him in. She was wearing a bathrobe.
[King] stated that he remembered sitting on a chair to use the telephone. He
remembered removing a pair of pantyhose from the chair, but did not remember
much of anything after that. He recalled that there was a struggle and that the
victim had fell back in the chair and onto the floor, hitting her head in the process.
He noticed she was not wearing anything under her robe and attempted to cover
her up. He told her he was sorry and then left. . . . He did not remember having
sex with the victim, although he also stated that he thought sex was what the
whole thing was about.

³ In his traverse, King disputes the California Court of Appeal’s characterization of his 1971 offense, but does not dispute any of the other offenses.

1 *Id.* at 17.

2 On appeal, the California Court of Appeal reviewed the lack of *Miranda* warnings on
3 March 7, 1995, and held that King's statements were still admissible because King had
4 voluntarily reinitiated contact with the officers and that he had made his statements freely. The
5 court concluded that "[i]n light of the physical injuries to the victim and the DNA evidence tying
6 appellant to those injuries, there was no real question as to what crimes had been committed or
7 as to who had committed them." *Id.* at 22.

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9 B. New Evidence

10 King now claims that he is actually innocent, and provides two new pieces of evidence:
11 his own August 25, 2011 declaration, and a November 30, 2010 declaration from Cindy Wilson.
12 Opposition To Motion To Dismiss, Unnumbered Exhibits.

13 Cindy Wilson's declaration provides this story: Wilson knew the victim,⁴ and recalled
14 being at the victim's house sometime in late September. The victim's boyfriend, Jimmy, was
15 present. Wilson witnessed a physical altercation between the victim and Jimmy. She intervened
16 and broke up the fight. When Jimmy left, the victim was still alive. Wilson left the victim's
17 house and came back approximately six hours later, where she found the victim looking like she
18 "had been in a fight." Wilson Decl., p. 1. The victim told Wilson that a drug dealer named
19 "Heavy Jackson" had beaten her because she was a police informant, and because he wanted a
20 videotape she had made showing criminal activity in the neighborhood. *Id.* at 2. That night,
21 when Wilson left, the victim was still alive and had only minor injuries. As she walked away
22 from the house, Wilson saw two African American males outside the victim's house. She heard
23 one of them say, "Heavy, she's leaving." *Id.* Approximately one week later, Wilson heard that
24 the victim had been murdered. Wilson never told anyone else what she had allegedly witnessed,
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27 ⁴Both King and Wilson refer to the victim as Althea Taylor, age 69. The California Court
of Appeal identified the victim as Leticia Smith, age 76.

1 and did not tell the police because she didn't want to play the "[s]nitching game." *Id.* In late
2 January or early February 2010, Wilson learned that Jimmy had been convicted of murdering
3 the victim. She obtained Jimmy's address in prison and wrote to him.⁵

4 King's 2011 declaration provides this story that often contradicts the statements he made
5 to the police in 1995: King and the victim were a couple and had a sexual relationship. On
6 September 27, 1992, he had a fight with the victim in which "she struck me, and I pushed her
7 several times, and we started pushing each other and grabbing each other." King Decl., p. 1.
8 A young lady broke up the fight. King left the victim's house while the victim was still alive.
9 He returned the next day and found her body. Two and a half years after the crime, the
10 Richmond Police Department arrested him. On March 7, 1995, while in custody, King requested
11 a smoke break. The police investigators took him to the rooftop, drew their service weapons and
12 threatened him. *Id.* at 3. King was "repeatedly punched, kicked and knocked to the floor." *Id.*
13 The police demanded that King tell them who committed the murder. King states that he was
14 told by the D.A. investigator that he (King) was the killer and that he got into a fight with the
15 victim and that's what killed her. King sates, "I was told to make that statement and I did, and
16 told if I did not make it in that manner, I would be getting my brains blown out for trying to
17 escape. So, I made the statement about having gotten into a physical latercation(sic) with Ms.
18 Taylor, maybe injuring her, and having no knowledge of any sexual assault of her." *Id.*
19 Notwithstanding having provided the statement that he maybe had injured the victim and had
20 no knowledge of any sexual assault, he now states that he had repeatedly told the police that he
21 and the victim were a couple, that they had a minor fight on the day before her body was found,
22 and that she was still alive when he left that day.

26 ⁵ Wilson does not provide a last name for the man she knew as "Jimmy" but
27 circumstances such as King's receipt of her letter suggest that it was the Petitioner, James E.
28 King.

1 C. Actual Innocence Analysis

2 King has the burden of showing that more likely than not, given the evidence at trial
3 combined with his newly discovered evidence, no reasonable juror could have found him guilty.
4 In sum, King must persuade this court that if his new evidence – his own self-serving declaration
5 and the new declaration from Cindy Wilson – had been presented at trial, then “every juror
6 would have voted to acquit him.” *Lee*, 653 F.3d at 946 (Kozinski, J. concurring).

7 The King and Wilson declarations do not make a credible, let alone convincing, showing
8 of actual innocence. Considering the evidence presented at trial along with the new evidence,
9 any reasonable jury could have found him guilty. King’s declaration is not credible evidence
10 of innocence because it (1) does not explain why, before he allegedly was coerced, he denied
11 even knowing the victim, (2) does not explain why he never mentioned in 1995 that there was
12 a witness to the fight between him and the victim, and (3) does not explain the 15+ year delay
13 in telling the current story. King's declaration also appears to contradict the factual basis for the
14 *Miranda* claim he *did* make on appeal: whereas he now contends he was not given *Miranda*
15 warnings until the second day of questioning he argued on appeal that the *Miranda* rights
16 provided to him on the first day of questioning did not carry over to the second day of
17 questioning. Further, the details of the King's declaration do not even match his federal petition
18 signed just a few months earlier. King stated in his petition that he was taken to the roof, and
19 his interaction with officers occurred at the door to the roof, whereupon he fell to the ground
20 without any struggle. *See* Docket # 1, p. 8 (“I fell to my knees in a heap as they read me my
21 rights.”). In his declaration, in place of falling to his knees and being Mirandized, King now
22 states: “I was then rushed by the trio, and repeatedly punched, kicked, and knocked to the floor,
23 in what would be a series of beatings thereafter, and it was demanded that I tell on whomever
24 committed the murder.” King Decl., p. 3.

25 Wilson’s declaration also is not credible and, more importantly, is not strong evidence
26 of King's innocence. She states that only in early 2010 did she learn that King had been
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1 convicted of killing Taylor, but that is highly suspect for a person as close to the victim and
2 situation as she describes. Wilson states that (1) her aunt was the “close friend” of the decedent,
3 (2) Wilson was close to the victim who she visited just hours before the victim was killed, (3)
4 Wilson saw King and the victim fighting and broke up the fight just hours before the victim was
5 killed, and (4) Wilson saw two alleged drug dealers lurking in the area when she left the house.
6 *See* Wilson Decl., p 2-3. It is not credible that a person with this extensive connection to the
7 victim would not have learned until 18 years after the killing that the person she saw fighting
8 with the victim just before the victim died had been convicted of the killing. Further, the
9 extreme detail itself makes a declaration made 18 years after the event suspect. Most
10 importantly, even if one believed it, Wilson's declaration does not exonerate King but only
11 shows that Wilson at most saw circumstances suggesting that someone other than King may
12 have been the murderer. Her declaration confirms that she did not see who killed the victim, she
13 did not recall the date on which she saw King leave the house after fighting with the victim, she
14 left the house and therefore would not know whether King returned to kill the victim, and she
15 did not learn of the killing until a week later.

16 The original federal petition has only one claim and that claim does not depend on the
17 new evidence. King's *Miranda* claim – i.e., that the 2-step interrogation process was improper
18 – rests on the sequence of the interrogations and *Miranda* advisements. He has never needed
19 the evidence of his innocence to pursue that claim.

20 Finally, King offers no explanation as to why defense counsel and he never considered
21 asserting a coerced confession defense at trial or on appeal. It would be unlikely that such an
22 obvious defense would be ignored, especially when there actually was a *Miranda*-based
23 challenge to the admission of King's statements to police. *See* California Court of Appeal
24 Opinion, p.19.

25 Given King's history of sexual offenses, the DNA evidence linking King to sexual
26 contact with the victim, King's inconsistent statements, and Wilson's lack of personal
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1 knowledge of the crime, it cannot be said that, more likely than not, no reasonable juror would
2 have convicted him. King has failed to present sufficient evidence to persuade this court that
3 “that every juror would have voted to acquit him,” *Lee*, 653 F.3d at 946. He has not made a
4 credible showing of actual innocence that would qualify for equitable tolling of the limitations
5 period.

6 King’s federal habeas petition, filed over nine years after the expiration of the limitations
7 period, is untimely and will be dismissed.

8 King’s motion for a stay to exhaust state court remedies is DENIED. King has not shown
9 good cause for his failure to exhaust those claims and has not shown those new claims to be
10 other than meritless. *See Rhines v. Weber*, 544 U.S. 269 277-78 (2005). There is no reason to
11 stay the action to allow him to exhaust new claims that also would be untimely.

12 A certificate of appealability will not issue because this is not a case in which “jurists of
13 reason would find it debatable whether the petition states a valid claim of the denial of a
14 constitutional right and that jurists of reason would find it debatable whether the district court
15 was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).


16 17 CONCLUSION

18 Respondent’s motion to dismiss is GRANTED. (Docket # 6). The petition for writ of
19 habeas corpus is dismissed because it was not filed before the expiration of the limitations period
20 in 28 U.S.C. § 2244(d)(1). Petitioner’s motion for a stay and abeyance is DENIED. (Docket
21 #12).

22 The clerk will close the file.

23 IT IS SO ORDERED.

24 DATED: December 6, 2011

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SUSAN ILLSTON
United States District Judge